No. 86-1969

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1986

SOFIA CAMPOS-GUARDADO,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the decision below is inconsistent with this Court's decision in *INS* v. *Cardoza-Fonseca* because it requires an asylum applicant to establish by a "clear probability" of the evidence that the persecution she fears is "on account of race, religion, nationality, membership in a particular social group or political opinion"?

II. Whether the court below erred in holding that an asylum applicant who witnessed the political execution of her family members, who herself was raped and threatened by the same persecutors is unprotected by the Refugee Act of 1980?

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IMMIGRATION AND NATURALIZATION SERVICE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Sofia Campos-Guardado, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on March 9, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 809 F.2d 285 and is reprinted in the appendix. App. 1a. The opinions of the Board of Immigration Appeals, App. 13a and of the Immigration Court, App. 22a, are unreported.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 10, 1987. A timely petition for rehearing and suggestion for rehearing *en banc* were denied on March 9, 1987. App. 30a. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1). The petition for a writ of certiorari has been filed within the time allowed by law.

STATUTE INVOLVED

Section 101(a)(42) of the Immigration and Nationality Act of 1952, 8 U.S.C.§ 1101(a)(42) provides, in pertinent part:

> The term "refugee" means (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Section 208(a) of the Immigration and Nationality Act of 1952, 8 U.S.C.§ 1158(a) provides:

> The Attorney General shall establish a procedure for an alien physically present in the United States or at a land border or port of entry, irrespective of such alien's status, to apply for asylum, and the alien may be granted asylum in the discretion of the Attorney General if the

> Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A) of this title.

Section 243(h)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C.§ 1253(h)(1) provides in pertinent part:

> The Attorney General shall not deport or return any alien . . . to a country if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion.

STATEMENT OF THE CASE

This case raises important questions concerning the scope of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 and this Court's recent decision in *INS* v. *Cardoza-Fonseca*, 107 U.S. 1207 (1987). The facts of the underlying controversy are largely undisputed.

Petitioner Sofia Campos-Guardado is a twenty-three year old native and citizen of El Salvador. In early 1984, Ms. Campos visited her uncle, the chairman of a local agricultural cooperative formed as a result of the controversial land reform movement in El Salvador. Undisputed evidence in the record demonstrates that participants in this movement are the object of both governmental and non-governmental persecution. Record 42-43.

Shortly after petitioner reached her uncle's farm, two men with rifles, accompanied by a woman, arrived, forced open the door and dragged the petitioner, her uncle and four cousins — one boy and three girls — to a nearby pit used to

dump farm wastes. After tying all the victims' hands and feet and gagging the girls, they tortured the uncle and male cousin by hacking the flesh from their bodies with machetes before finally shooting them to death. Then, the attackers raped the girls, including petitioner. During this entire episode the female companion of the attackers shouted political slogans. When the two men finally cut the girls loose, they threatened to kill all the girls, including petitioner, unless they fled immediately. Ms. Campos then escaped to the capital, San Salvador, where she was hospitalized for 15 days for treatment of a nervous breakdown. App. 2a-3a, 14a-15a.

Fearful of another attack, the petitioner remained in San Salvador, where she found work. During her first visit home, she encountered one of the assailants again. He repeatedly sought her out, each time threatening to kill her and her parents if she revealed his participation in the events at her uncle's cooperative. App. 3a, 16a. Shortly afterwards, the petitioner fled to this country, was apprehended by the Immigration and Naturalization Service ("INS") upon entry and detained for eight months in the INS Houston Service Processing Center where she applied for asylum and withholding of deportation.[1]

Petitioner's deportation hearing was held on January 23, 1985. She found testifying about the details of her experiences in El Salvador so traumatic that the immigration judge suspended the hearing so she could be given a sedative and

1. Petitioner was charged with entering the country without inspection under Section 241(a)(2) of the Immigration and Nationality Act of 1952, ("the Act"), 8 U.S.C. § 1251(a)(2).

other medical attention, noting from the bench that the petitioner was "obviously emotionally distraught." *See* App. 24a-25a. When it became apparent that she could not continue testifying, even with medication, the hearing was postponed until January 30, 1985. App. 25a. When the hearing resumed, the parties agreed that the petitioner could submit an affidavit describing the critical events rather than testify in person. App. 14a n.2., 15a. The petitioner later submitted an affidavit from a nurse who had treated her at the INS Processing Center, stating that the petitioner was suffering from an extreme case of post-tramatic stress disorder.

The immigration judge accepted petitioner's account of events in El Salvador. He nevertheless found that she was only "an innocent victim in the violence that all too frequently disrupts life in El Salvador," and therefore determined that she was ineligible for asylum under the Refugee Act of 1980. App. 28a.

That ruling was affirmed by the Board of Immigration Appeals ("Board" or "BIA") App. 14a, which issued its opinion before this Court's decision in *INS* v. *Cardoza-Fonseca*, 107 S.Ct. 1207 (1987). Contrary to *Cardoza-Fonseca*, the Board premised its holding on the assumption that petitioner had to establish a "clear probability" that she would be persecuted should she return to El Salvador. App. 20a. Like the Immigration Judge, the BIA accepted the veracity of petitioner's account that her uncle had been killed because of the political beliefs that he held, that she had been raped by his murderers and that her life and the lives of her family members had been threatened because she had witnessed her relatives' executions. App. 20a. Nonetheless,

applying a "clear probability" standard[2] the Board rejected the notion that petitioner was eligible for asylum because she feared persecution on account of a political opinion that may have been attributed to her or because of her membership in that particular social group, her family. App. 20a.

On appeal, the Fifth Circuit recognized that the BIA had applied the wrong standard of proof in assessing petitioner's claim of persecution. App. 9a. It nonetheless affirmed the Board's denial of asylum on the ground that she had failed to establish that the persecution she suffered and "the harm she fears—no matter how likely—is on account of 'political opinion' or 'membership in a social group.' " App. 12a. The court reached this conclusion by collapsing the distinct claims that petitioner made under the Refugee Act into the single category of "political opinion":

> Because Ms. Campos's claim of persecution on account of "group membership" relies upon the attackers' alleged attribution of political opinions to the family group, we focus on the scope of the statutory term "political opinion."

App. 5a.

Having focused on the term "political opinion", however, the Fifth Circuit did not define the applicable evidentiary

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2. "The respondent must establish the facts underlying her claim for such relief by a preponderance of credible, probative evidence." App. 18a.

standard. Instead the court accepted the BIA's finding that the record was insufficient to demonstrate persecution based on political opinion. App. 11a-12a. The BIA, in turn, had reached this conclusion by applying a "clear probability" standard. App. 20a. Implicitly adpoting this standard, the Court below upheld the Board's denial of petitioner's asylum claim.

In short, the Fifth Circuit applied a "reasonable possibility" standard or its equivalent in judging the *likelihood* of persecution while endorsing a "clear probability" standing for judging the *basis* of the persecution. The use of the two separate standards for evaluating the obviously interrelated elements of the refugee definition adopted by Congress is inconsistent with both the Refugee Act and this Court's holding *INS* v. *Cardoza–Fonseca*.

REASONS FOR GRANTING THE PETITION

I.

THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S HOLDING IN *INS* v. *CARDOZA–FONSECA*

The Refugee Act of 1980 was intended by its framers to provide broad protection to those seeking asylum in this country. Under its terms, aliens who apply for asylum are eligible for relief if they can show that they cannot return to their country of origin because of

> persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42).

Only three months ago, in *INS* v. *Cardoza–Fonseca*, 107 S.Ct. 1207 (1987), this Court found that an alien satisfies this standard if there is a "reasonable possibility" that on return to her home she will be persecuted on account of any one or more the five enumerated bases. *Id.* at 1217-18. The Court explicitly rejected the notion that an asylum applicant must establish eligibility under the "clear probability" test that had previously been applied by the BIA. *Id.* at 1215, 1219.

In this case, the Fifth Circuit properly recognized that the "clear probability" standard could not be applied in determining the likelihood of persecution if petitioner returned to El Salvador. Contrary to *Cardoza-Fonseca,* however, it adopted the "clear probability" standard of the BIA in determining whether the persecution petitioner has already suffered, and is likely to suffer in the future, rests on one of the

five enumerated statutory bases. That result is unjust and untenable given this Court's interpretation of the Refugee Act.[3]

In *Cardoza–Fonseca*, the Court examined the "plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history" to find that Congress intended the asylum provision to protect a "broad[er] class" of people than those eligible for relief under the withholding of deportation section. *Id.* at 1222. The more generous asylum standard adopted by Congress both recognizes the difficulties that refugees face in producing proof of their particular circumstances and gives " 'the United States sufficient flexibility to respond to [the many] situations' " in which persecution, motivated by race, religion, nationality, membership in a particular social group, or political opinion, occurs. *Id.* at 1222, *quoting* H.R. Rep. No. 96-608, 96th Cong., 1st Sess., p. 9 (1979). This difficulty in producing evidence is particularly acute if the applicant is required to rigorously prove the motivation for her persecutor's actions. Recognizing this situation, the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979) observes:

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3. The Fifth Circuit also creates an arguable conflict with other circuits. In particular, the Ninth Circuit has emphatically rejected an overly-strict evidentiary burden for asylum claims, requiring only that an applicant's evidence support a reasonable finding that the feared persecution is based on one of the five listed grounds. See, e.g., *Turcios* v. *INS*, 813 F.2d 262, 265 (9th Cir. 1987) ("reasonable explanation" of persecutors' actions sufficient to show their motivation).

> Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.

Id. at ¶ 66

Nowhere in *Cardoza–Fonseca* did this Court imply that the less exacting "reasonable possibility" standard is to be applied exclusively to the "fear of persecution" phrase, while the rump of the refugee definition, "on account of race, religion, nationality, membership in a particular social group, or political opinion" would answer to the higher evidentiary standard. Rather, the Court's discussion considered the refugee definition as a whole, treating the "on account of" phrase as a modifier of the persecution referred to in the opening clause, and subjected all the evidence to a single, unified standard. Indeed, the Court noted in *Cardoza-Fonseca* that the origin of the refugee definition and the well-founded fear standard can be traced to one first used in the Constitution of the International Refugee Organization ("IRO") 62 Stat. 3037 (1946).[4] Under the IRO's interpretation, it is clear that the relaxed standard of proof intended for asylum seekers is to apply equally to proof of their fear of persecution as well as to its motives:

> Fear of persecution is to be regarded as a valid objection whenever an applicant can make *plausible* that owing to his religious or political convictions or to his race, he is

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4. The IRO Constitution was signed on behalf of the United States on December 16, 1946, and entered into force August 20, 1948.

> afraid of discrimination, or persecution on returning home. *Reasonable grounds* are to be understood as meaning that the applicant can give a plausible and coherent account of why he fears persecution.[5]

Should the lower court's uneven application of the standard of proof for refugee status be permitted to stand, the provisions lose much of their force. Specifically, the generous evidentiary standard would not apply to the crucial adjectival phrase, "on account of." This cannot be the case: Congress did not give aliens a generous standard by which to prove their well-founded fear of persecution only to take it away by imposing an overwhelming burden of proof as its basis.

Because the issue of whether an asylum applicant must show by a "clear probability" of the evidence that her persecution would be "on account of" one of the enumerated grounds is crucial to ensuring that the Refugee Act is applied consistently with the standards established by this Court in *Cardoza-Fonseca,* review by this Court is warranted.

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5. International Refugee Organization, Manual for Eligibility Officers, ch. IV, No. 175, Annex 1, pt. 1 § C19, p. 24 (May 1950), *cited in Cardoza–Fonseca,* 107 S.Ct. at 1216 n. 20 (emphasis added).

II.

THE DECISION BELOW UNDERMINES THE HUMANITARIAN PURPOSE OF THE REFUGEE ACT

In enacting the Refugee Act of 1980, Congress sought to "give the United States sufficient flexibility to respond to [the many] situations in which persecution may occur." H.R. Rep. 96-608 at 9. Given this purpose and the broad, inclusive language of the statute, it is inconceivable that someone who has witnessed the political execution of members of her family, has been raped by their murderers and threatened because of her knowledge of these events[6] should not be protected under the terms of the Act.

The BIA and the Court of Appeals rejected petitioner's claim on the ground that the harm she had suffered was the result of the general conditions of civil strife that beset her country. *See* App. 9a, 20a. Nothing could be further from the truth. The petitioner here became the direct target of her persecutors' attentions As a result of having witnessed the political execution of her family. She was then raped by the same persecutors, who also threatened petitioner and her family with death.

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6. Persecution need not be government-sponsored to fall within the statute: it is well-recognized that persecution may also be inflicted by groups or individuals that the government is either unable or unwilling to control. *See, e.g., Matter of Acosta*, Int. Dec. # 2986 at 17 (BIA 1985); *McMullen* v. *INS*, 17 I&N Dec. 542 (BIA 1980), *rev'd on other grounds, McMullen* v. *INS*, 658 F.2d 1312, 1315 n.-2 (9th Cir. 1981).

Under the circumstances of this case, petitioner can plausibly claim the protection of the Act on a variety of of grounds: on account of the political opinion held by her uncle and attributed to her;[7] on account of the political opinion motivating her persecutors;[8] on account of membership in that particular social group of family;[9] or as a witness to a political execution. What cannot be correct is the government's position that the Act has no application to these facts whatsoever.

The error of the Fifth Circuit approach to this case is compounded by its analysis of petitioner's experience as a series of isolated incidents. *See* App. 9a. Rejecting petitioner's claim that she was eligible for asylum, the Fifth Circuit determined that no single event experienced by petitioner fell squarely within any of the five categories established by the statute. App 10a. Such a rigid and piecemeal analysis

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7. The courts have also extended refugee protection to persons who have been persecuted or fear persecution on account of political opinions attributed to them. *See, e.g. Hernandez-Ortiz* v. *INS*, 777 F.2d 509 (9th Cir. 1985); *Argueta* v. *INS*, 759 F.2d 1395 (9th Cir. 1986); *Coriolan* v. *INS*, 559 F.2d 993 (5th Cir. 1977).

8. The opinion of the persecutor alone may be sufficient to show that the motivation was political. *See e.g. Coriolan* v. *INS*, 559 F.2d 993, 1001 (5th Cir. 1977)(noting that persecution may occur without the victim "ever taking any . . . 'political action' "); *Hernandez-Ortiz* v. *INS*, 777 F.2d 509, 516 (9th Cir. 1985 ("persecution occurs only when there is a difference of views between the persecutor's views or status and that of the victim")).

9. *See e.g., Sanchez–Trujillo* v. *INS*, 801 F.2d 1571, 1576 (9th Cir. 1986) ("[p]erhaps the prototypical example of a 'particular social group' would consist of the immediate family members of a focus of fundamental affiliational concerns and common interests for most people").

conflicts with the overarching humanitarian purpose of the Refugee Act and has been explicitly rejected by the *United Nations Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva 1979), which this Court found "provide[d] significant guidance in construing the [United Nations Refugee] Protocol, to which Congress sought to conform." *Cardoza-Fonseca,* 107 S.Ct. at 1217 n.22. As observed in the *Handbook*:

> [v]ery frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. . . The cumulative effect of the applicant's experience must be taken into account . . . [A]lthough no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear well-founded.

Id. at ¶201.

Furthermore, persecution may occur in different guises and an alien's claim may cross several categories. *Id.* at §66 ("[i]t is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them"); *see also Carcamo-Flores* v. *INS*, 805 F.2d 60, 64 (2d Cir. 1986) (in an asylum case, "no one type of evidence, and no one kind of persecution, will apply to all cases").

Because the Board separately analyzed each event related by petitioner, instead of viewing them cumulatively, it erroneously determined that petitioner was not eligible for asylum based on political opinion or any other ground specified in the Act. Thereafter, the Fifth Circuit subsumed Ms. Campos's claims into the "political opinion" category ("[b]ecause Ms. Campos's claim of persecution on account of group

membership relies upon the attackers' alleged attribution of political opinions to the family group'' App. 5a) and agreed with the Board's restrictive analysis. Both decisions failed to consider that the totality of events which clearly demonstrate that petitioner was caught in a political controversy that made her the continuing focus of her attackers' politically motivated persecution. By severing the connection between events, the court lost sight of their political significance and endorsed a restrictive and unjustified construction of the statute.

If permitted to stand, the court's decision not only leaves Ms. Campos without relief but also renders other similarly endangered individuals without the protection Congress intended to provide and thereby whittles away the ''broad class'' that this Court found to be included under the Act. *See Cardoza-Fonseca,* 107 S.Ct. at 1218.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, the decision below should be reversed and remanded for further consideration in light of this Court's decision in *Cardoza-Fonseca*.

Respectfully submitted,

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June 6, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-4087

SOFIA CAMPOS-GUARDADO, PETITIONER,

v.

U.S. IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

Petition for Review of an Order of the Immigration and Naturalization Service

Argued and Submitted September 9, 1986
New Orleans, Louisiana

[Filed February 10, 1987]

OPINION

Before: GEE and HILL, Circuit Judges, and HUNTER,* District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

GEE, Circuit Judge:

Sofia Campos-Guardado appeals the denial of her requests for withholding of deportation and asylum by the Board of Immigration Appeals. She also appeals the Board's grant of only twelve days in which to depart voluntarily. We conclude that the Board did not err in construing the terms of the pertinent statutory provisions and that the record reflects substantial evidence to support the Board's conclusions that Ms. Campos is not entitled to withholding of deportation and is not eligible for a discretionary grant of asylum. Because Ms. Campos did not exhaust her administrative remedies on the issue concerning the length of time for voluntary departure, we are without jurisdiction to review that claim.

FACTS

Sofia Campos-Guardado, a native of El Salvador, illegally entered the United States in the fall of 1984.[1] After conceding deportability, she applied for asylum and withholding of deportation. In support of her applications, Ms. Campos testified about incidents of violence in El Salvador, focusing on one particular episode. In early 1984, by her account, she took a two-hour bus trip to her uncle's home, to repay a debt owed by her father. Her uncle was the chairman of a local agricultural cooperative, one formed as a result of the controversial agrarian land reform movement instituted

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1. Ms. Campos relatively recent advent renders her ineligible for legalization pursuant to the immigration Reform and Control Act of 1986, Pub.L. No. 99-603 . . . 99-603, sec. 201, 100 Stat. ____ (Nov. 5, 1986). Sec. 201 provides that, in order to be eligible for legalization, the alien "must establish that he entered the United States before January 1, 1982," and that he has resided continuously in the United States in an unlawful status since that date.

several years earlier. When she arrived, she found her uncle apprehensive; he explained that the day before two men had demanded money he held for the co-op and he had refused them. Although frightened, she remained to visit with her cousins. Later, an older woman and two young men with rifles arrived and knocked down the door. They dragged Ms. Campos, her uncle, a male cousin and three female cousins to the rim of the farm's waste pit. They tied all the victims' hands and feet and gagged the women. Forcing the women to watch, they hacked the flesh from the men's bodies with machetes, finally shooting them to death. The male attackers then raped the women, including Ms. Campos, while the woman who accompanied the attackers shouted political slogans. The assailants cut the victims loose, threatening to kill them unless they fled immediately. They ran and were taken to a hospital in San Salvador. Ms. Campos suffered a nervous breakdown and had to remain in the hospital 15 days.

Ms. Campos did not return to live with her parents, but remained to work in a factory in San Salvador. On her first visit home, two young men arrived at the door. Her mother introduced them as cousins who had recently fled from the guerrillas and moved into the neighborhood. Ms. Campos immediately recognized one of them as one of her assailants. She testified that he later sought her out several times and threatened to kill her and her family if she revealed his identity. She did not disclose what she knew. After her workplace in San Salvador was burned down by guerrillas, Ms. Campos did not want to return to live at her parents' home near her cousin-assailant. She came to this country.

Affirming the immigration judge's decision, the Board held that Ms. Campos failed to meet her burden of proof to establish entitlement to withholding of deportation and statutory eligibility for asylum.

THE LAW

An alien has two distinct statutory modes of avoiding deportation. The withholding of deportation remedy provides that the Attorney General "shall not deport or return" an alien if his life or freedom "would be threatened" in the country of deportation on account of any one, or a combination of, five enumerated grounds. These are race, religion, nationality, membership in a particular social group, and political opinion. Immigration and Nationality Act (INA) § 243(h)(1); as amended at 8 U.S.C. § 1253(h)(1).[2] This remedy is mandatory if the alien successfully shows that his or her life or freedom would be threatened upon return to the country of deportation.

By contrast, the asylum remedy is discretionary; the Attorney General may grant asylum to aliens physically present in this country if they qualify as "refugees." 8 U.S.C. § 1158(a). The statute defines a refugee as one who is unwilling or unable to return to his homeland "because of persecution or a well-founded fear of persecution" on account of the same five statutory grounds that form the basis for the withholding of deportation remedy. 8 U.S.C. § 1101(a)(42)(A).

THE ISSUE

Ms. Campos bases her claims on two grounds, "political opinion" and "membership in a particular social group." She asserts she was persecuted in El Salvador for political opinions attributed to her by her assailants, on account of her

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2. The INA was amended by the Refugee Act of 1980; Pub.L. No. 96-212, 94 Stat. 102.

family membership, and because of the concommitant association of the family with the agrarian land reform movement; as an eyewitness to the political assassination of her uncle and cousin, she is subject to future persecution if deported to El Salvador.

Because Ms. Campos's claim of persecution on account of "group membership" relies upon the attackers' alleged attribution of political opinions to the family group, we focus on the scope of the statutory term "political opinion." Ms. Campos contends the Board too narrowly construes this term in determining entitlement to withholding of deportation and eligibility for a discretionary grant of asylum. She asserts the Act contemplates persecution on the basis of political opinion imputed to the victim, whether rightly or wrongly, by the persecutor; the Board, she contends, impermissibly imposes as a prerequisite that the alien *personally hold* the political opinion that gives rise to the persecution.

Ms. Campos directs us to certain language in the Board's decision stating that

> a showing that a persecutor's conduct furthers his goal in a political controversy is insufficient to establish persecution on account of "political opinion" within the meaning of the Act. Instead, the alien must show that it is his own, individual political opinion that a persecutor seeks to overcome by infliction of harm or suffering.

Although the Board assumed the veracity of Ms. Campos's account of the events at her uncle's house, and that the attack resulted from her uncle's political views, it nevertheless concluded that Ms. Campos "had not shown that the

attackers harmed her in order to overcome any of *her own* political opinions.''[3]

The Board further found it unlikely that the attackers had targeted Ms. Campos as a victim, because they could not have expected her to be present at her uncle's home that day. It concluded:

> Thus, while the attackers may have been motivated by their own political goals such as, for example, the intimidation of other peasants involved in land reform, the record does not establish that [Ms. Campos] was persecuted on account of any political opinion she herself possessed or was believed by the attackers to possess.

Concerning Ms. Campos's fear of her assailant should she return to El Salvador, the Board concluded that these threats of reprisal were personally motivated — to prevent her from exposing his identity — and that there was ''no indication he maintained an interest in her because of her political opinion or any other grounds specified in the Act.''

Ms. Campos also contends this language indicates that the Board failed to consider all the relevant evidence. She argues the reasons motivating the persecutor are of greater importance than any opinion actually held by the victim. She asserts the record is replete with evidence that peasant leaders in the agrarian reform movement and their families are singled out for persecution; once she was in her uncle's

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3. The Board noted that Ms. Campos did not establish or even assert that she personally held political opinions which would make her a target for persecution. Ms. Campos does not dispute this determination.

home, his political views were attributed to her. Therefore, she argues, it was unreasonable for the Board to assume that the persecutors' reasons for victimizing her were different from their political motivations behind the torture, execution and rape of her family members. Further, as an eyewitness to the political assassination of her relatives, she contends that she is now a permanent target for future persecution.

STANDARDS OF REVIEW

A denial of the withholding remedy must be sustained if supported by substantial evidence. 8 U.S.C. § 1105a(a)(4); *Young* v. *U.S. Dept. of Justice, I.N.S.*, 759 F.2d 450, 455-56 n. 6 (5th Cir.), *cert. denied*, __ U.S. __, 106 S.Ct. 412, 88 L.Ed.2d 362 (1985). Because the decision whether to grant asylum is expressly at the discretion of the Attorney General, we cannot disturb the ultimate denial of asylum "absent a showing that such action was arbitrary, capricious, or an abuse of discretion." *Id.*

The Board's denial of relief is subject to review for errors of law. *Ka Fung Chan* v. *INS*, 634 F.2d 248, 252 (5th Cir.1981); *Coriolan* v. *INS*, 559 F.2d 993, 999 (5th Cir.1977). Our review, however, is limited. The Supreme Court has noted that an administrator such as the Attorney General has considerable discretion in interpreting and implementing the statutory provisions of the Immigration and Naturalization Act. *INS* v. *Stevic*, 467 U.S. 407, 429 n. 22, 104 S.Ct. 2489, 2500 n. 22, 81 L.Ed.2d 321 (1984). We accord deference to the Board's interpretation of immigration statutes unless there are compelling indications that the Board's interpretation is wrong. *Guevara Flores* v. *INS*, 786 F.2d 1242, 1250 n. 8 (5th Cir.1986) (citations omitted).

STATUTORY CONSTRUCTION

We first address Ms. Campos's contention that the Board misconstrues the scope of the "political opinion" grounds by requiring that the alien personally espouse the political belief that gives rise to the persecution. This Court has implied that a father's showing that he would be subject to harm because of his son's political activity is relevant evidence to show a well-founded fear of persecution. *Young* v. *U.S. Dept. of Justice, I.N.S.*, 759 F.2d at 456 & n. 7. We have also implied that membership in a group that is singled out for persecution because of political beliefs is relevant to showing a likelihood of persecution should the alien be deported. *Bahramnia* v. *INS*, 782 F.2d 1243, 1248 (5th Cir.1986). Under extreme circumstances, such as those obtaining under the former Duvalier regime in Haiti, the Service cannot presume that people without overt political activity, or lacking minority political opinions, will not be the victims of political persecution. *Coriolan* v. *INS* 559 F.2d at 1001, 1004.

We do not, however, read the Board's decision as impermissibly resting on a single fatal flaw, i.e. that the alien failed to establish that she personally held the political beliefs in question. The Board specifically noted "the record does not establish that [Ms. Campos] was persecuted on account of any political opinion she herself possessed *or was believed by the attackers to possess.*" (Emphasis added). Neither does the record reveal the sort of extraordinary circumstances existing in the *Coriolan* case, circumstances that require more latitude in assessing whether the persecution is on account of political opinion.

Ms. Campos asserts the Board did not consider the relevant evidence on the political implications underlying the attack at her uncle's home and the future harm she fears. To the contrary, we find the Board specifically acknowledged the evidence about the family relationship, of her uncle's role as

a leader of the farm cooperative, and the documentary evidence discussing the agrarian reform movement and human rights violations in El Salvador. Contrary to Ms. Campos's contentions, the Board considered this evidence but concluded it was insufficient to establish that the harm Ms. Campos fears is based on political opinion, group membership, or a combination of the two.

We note that Congress chose not to define the reach of the term "political opinion." When Congress passed the Refugee Act of 1980, which amended the asylum provisions, it reiterated that it wished to "insure a fair and workable asylum policy which is consistent with this country's tradition of welcoming the oppressed of other nations." H.R.Rep. No. 608, 96th Cong., 1st Sess. 17 (1979). In passing the Act, however, the Congress specifically excluded the term "displaced persons" in its definition of refugee. An earlier version of the Senate bill had defined that term as including persons in their own country who have been displaced by military or civil disturbances or uprooted by arbitrary detention and are unable to return to their usual place of abode. *Compare* S.Rep. No. 256, 96th Cong., 1st Sess. 4 (1979) (accompanying S. 643) *with* H.Rep. No. 781, 96th Cong., 1st Sess. 19 (1979) (joint explanatory statement of the conference committee). Thus, we can infer that Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances — conditions that necessarily have political implications. The issue reduces to whether the political implications underlying an alien's fear of harm rise to the level of "political opinion" within the meaning of the statute or whether those conditions constitute the type of civil strife outside the intended reach of the statute. We have recognized that "a persuasive basis for vesting substantial discretion in the Service is that the evaluation of persecution claims involves the evaluation of

the political conditions of a nation — a task for which courts are not well-suited." *Coriolan* v. *INS*, 559 F.2d at 1001-02.

Therefore, we cannot conclude as a matter of law that the Board erred in determining that Ms. Campos's predicament was not one of feared persecution "on account of political opinion." Reviewing the record as a whole, we conclude the Board's denial of the withholding claim is supported by substantial evidence, as is its determination that Ms. Campos is statutorily ineligible for a discretionary grant of asylum.

DIFFERING STANDARDS FOR BURDEN OF PROOF

Ms. Campos also contends that the Board applied an incorrect burden of proof standard in determining whether she was eligible for asylum. We have recently addressed this issue, which may help to clear some of the legal underbrush that has proliferated in this area.[4]

The alien has the burden of persuasion to prove statutory eligibility for both the withholding and asylum remedies. 8 C.F.R. § 242.17(c) and § 208.5. The provision governing withholding requires a determination that the alien's life or freedom "would be threatened" if he or she were deported. The Supreme Court has construed this provision as requiring the alien to show a "clear probability" of persecution. *INS* v. *Stevic*, 467 U.S. at 429-30, 104 S.Ct. at 2501. The Court also

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4. We anticipate further clearing. The Supreme Court has granted writ of certiorari in a case addressing the issue whether the alien's burden of proving eligibility for asylum is equivalent to the burden of proving withholding of deporation. *Cardoza-Fonseca* v. *U.S.I.N.S.*, 767 F.2d 1448 (9th Cir.1985), *cert. granted*, __U.S.__, 106 S.Ct. 1181, 89 L.Ed.2d 298 (1986).

instructed that a clear probability is one that establishes it is "more likely than not that the alien would be subject to persecution on one of the specified grounds." *Id.*

The *Stevic* Court, however, expressly declined to decide the standard of proof the alien must satisfy to establish eligibility for asylum, i.e. what showing is required to establish a "well-founded fear" of persecution. Thereafter, the Board of Immigration Appeals characterized the alien's burden of proof for both forms of relief as "not meaningfully different." *In re Acosta*, I. & N. Interim Dec. 2986 (Mar. 1, 1985). We have now expressly rejected the Board's notion that the two standards converge. *Guevara Flores* v. *INS*, 786 F.2d at 1250 n. 8. As articulated in *Guevara*, the burden of proof in asylum cases is this: "An alien possesses a 'well-founded fear of persecution' if a reasonable person in her circumstances would fear persecution" if deported. *Id.* at 1249. Thus, at least in this Circuit and unless the Court directs us otherwise, the INS must apply this burden of proof standard in reaching its determination on statutory eligibility for asylum.

We turn to consider whether *Guevara*, which was issued three months after the Board's decision, might affect the outcome in today's case. The Board, stated in pertinent part:

> In the case before us, [Ms. Campos] has not met the statutory standard of eligibility for asylum, regardless of whether her claim is assessed in terms of demonstrating a "clear probability," a "realistic likelihood," a "reasonable possibility," or a "good" or "valid reason to fear" persecution.

Although the Board purports to review the asylum claim under standards less onerous than the "clear probability" standard, it also cites *Acosta* for the proposition that there is no meaningful distinction between the two standards. Under

these circumstances, we would usually remand to insure that the proper standard is applied. We perceive, however, that even if the *Guevara* standard is properly applied on remand, Ms. Campos will fare no better in obtaining eligibility for a favorable exercise of discretion. The distinction between the two burdens of proof goes to establishing the degree of certainty that persecution will occur if the alien is deported. The Board did not discuss Ms. Campos's failure to establish the requisite degree of probability of future persecution. The decision rested on different substantive grounds: Ms. Campos was found ineligible for asylum because she failed to show that the harm she fears — no matter how likely — is on account of "political opinion" or "membership in a social group," as those terms are used in the statute.

Finally, Ms. Campos contends that the Board abused its discretion in affirming the immigration judge's grant of only twelve days in which to depart voluntarily, instead of the customary thirty days. Ms. Campos, however, did not raise this as an issue in her appeal to the Board. This failure to exhaust her administrative remedies precludes our considering this issue on appeal. 8 U.S.C. § 1105a(c); *Young* v. *INS*, 759 F.2d at 454 n. 2; *Ka Fung Chan* v. *INS*, 634 F.2d at 258.

AFFIRMED.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

File: A26 422 119 – Houston

In re: SOFIA CAMPOS-GUAJDADO [sic][1]

IN DEPORTATION PROCEEDINGS

APPEAL

[Filed January 29, 1986]

CHARGE:

Order: Sec. 241 (a) (2), I&N Act [8 U.S.C. § 1251 (a) (2)] - Entered without inspection

APPLICATION: Asylum; withholding of deportation

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1. Documents in the record also spell the respondent's name as Guardado. As there is no issue regarding the respondent's identity, we find that these documents do, in fact, refer to the respondent. *See Corona-Palomera* v. *INS*, 661 F.2d 814 (9th Cir. 1981); *Vlisidis* v. *Holland*, 245 F.2d 812 (3d Cir. 1957); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980); *Matter of Leyva*, 15 I & N Dec. 118 (BIA 1977).

In a decision dated January 30, 1985, the immigration judge found the respondent deportable on the charge set forth above and denied her –applications for asylum and withholding of deportation under sections 208 and 243 (h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253 (h), but granted her the privilege of voluntary departure. The respondent has appealed. The appeal will be dismissed.

The 22-year-old single female respondent is a native and citizen of El Salvador. On September 11, 1984, an Order to Show Cause was issued, alleging that the respondent entered the United States on August 28, 1984, without inspection, and charging her with deportability under section 241 (a) (2) of the Act. At the deportation hearing, the respondent admitted the allegations in the Order to Show Cause and conceded deportability. We find that deportability has been established by clear, unequivocal, and convincing evidence. 8 C.F.R. § 242.14 (a); *Woodby* v. *INS*, 385 U.S. 276 (1966). The issue on appeal is whether the immigration judge properly denied the respondent's applications for asylum and withholding of deportation.

The respondent states that she fears she would be harmed if she returned to El Salvador because she has been persecuted in the past and has been a witness to the political persecution of members of her family. The respondent testified[2] that in February 1984 she travelled 2 hours by bus from her home in La Libertad to the home of her uncle, who was a farmer and

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2. At the hearing on her applications, the respondent became too emotionally upset to finish her testimony. When the hearing resumed, the respondent presented the rest of her testimony in the form of a written affidavit, and answered questions on cross-examination.

the local chairman of an agricultural cooperative. She stated that she went there as a favor to her father, to deliver payment on a debt her father owed her uncle. She stated that when she arrived, her uncle was apprehensive and explained that two men had come to his farm the day before demanding that he give them money that he was safekeeping for the cooperative. The respondent further stated that although her uncle had refused the demands of the men, he feared that they would return. The respondent testified that she remained at her uncle's house talking with cousins until late in the afternoon when two men arrived, knocked the door down, and entered the house with rifles. She stated that the men were approximately 20 or 25 years old and were accompanied by a woman about 60 years old. She stated that she, and her uncle, her male cousin, and her female cousins were dragged outside by the two men. She said that they were taken to the rim of a pit where farm wastes were dumped, their feet and hands were tied, and a cloth was put around their mouths. The respondent further stated that two men beat their skin and flesh from the limbs of her uncle and her male cousin with machetes, and finally shot them. According to the respondent, the two men proceeded to rape her 14-year-old cousin and then raped the respondent and her other cousins. She said that during the rapes, the woman encouraged the men and yelled political slogans. The respondent testified that she did not know what organization the two men and the woman belonged to. She also testified that after the rapes were finished, she and her cousins were cut loose and told that they had 2 minutes to leave or they would be killed too.

The respondent further testified that after the incident at her uncle's house, she and her cousins went to a hospital in San Salvador. The respondent stated that she stayed in the hospital for approximately 15 days because she had a nervous breakdown. She also stated that after her release from the

hospital, she remained in San Salvador, where she continued in her employment at a garment factory. She further stated that she visited her parents on weekends. The respondent testified that during her first weekend visit, her mother told her that her father's family had recently arrived in town, fleeing from the guerrillas. The respondent stated that while her mother was telling her this, two young men came by to watch television and her mother introduced them to her as her cousins on her father's side. The respondent further stated that she recognized one of the young men as one of the two men who had killed her uncle and male cousin, and raped her and her female cousins. According to the respondent, that man threatened that if she told anyone about the incident, she and her parents would die. She also stated that when she visited her parents on subsequent weekends, this same man would follow her, threaten her, and steal her money. She testified that she eventually stopped visiting her parents and fled El Salvador in August 1984 with money she had saved from her job at the factory.

The respondent also testified that the factory in which she worked was closed in August 1984 after it has been burned by guerrillas. She further stated that her commute to work on public transportation had become increasingly dangerous. She stated that frequently her bus would be stopped by members of the military, who would check passengers' identification papers, or by guerrillas, who would demand money from the passengers. The respondent described one incident during which masked men stopped her bus, pulled the passengers off, and killed a male passenger who did not have any money to give them. The respondent stated that she did not know which group the masked men belonged to.

In addition, the respondent testified that one of her seven brothers was living in the United States. She stated that he had been in the military in El Salvador and that he fled the country because the guerrillas had been looking for him.

In support of her applications for asylum and withholding of deportation, the respondent submitted documentary evidence consisting of reports, newspapers [sic] articles, and affidavits, discussing such matters as human rights violations in El Salvador, the treatment of Salvadorans returned to El Salvador from the United States, the exodus of Salvadorans into Mexico, the Geneva Convention protections of Salvadoran refugees, and persecution of women in El Salvador.

The immigration judge found that the respondent had failed to demonstrate that she would be persecuted or that she has a well-founded fear of persecution within the contemplation of sections 208 or 243 (h) of the Act. He stated that the violence and subsequent threats of reprisals which the respondent had been the victim of in El Salvador did not establish that she would be singled out for persecution in that country for any of the grounds specified in the Act.

On appeal, the respondent contends that she has established that she has a well-founded fear of persecution. She argues that the incident at her uncle's house was politically motivated as her uncle, a peasant cooperative official and, presumably, a social activist and a supporter of land reform, was a prime target for political persecution. She contends that although she herself may not have been involved in the agrarian reform movement, her uncle's beliefs and activities were imputed to her because she was present in his home the day his attackers arrived. She also argues that because she is a surviving witness to political persecution, she became and remains a target of persecution in her own right. In support of her appeal, she submitted a report and newspaper articles on agrarian reform in El Salvador, a letter from a legal advisor for the United Nations High Commissioner for Refugees regarding the respondent's case, and an affidavit from the attorney who represented the respondent at the hearing. In his affidavit, the respondent's former attorney states that at

the time he elicited the respondent's affidavit used at the hearing, the respondent was still upset. He states that it was only after many conversations with the respondent that he learned more details, such as the respondent's belief that the attack at her uncle's house was politically motivated. He avers that the respondent told him the two men were similarly dressed and wore bandanas, and that the woman with them shouted political slogans.

The Service contends that the decision of the immigration judge is correct. It is argued that the respondent's fear of harm is based on retribution, in the event that she disclosed the identity of her assailant, rather than persecution for any of the grounds specified in the Act.

The respondent bears the evidentiary burdens of proof and persuasion in any application for withholding of deportation under section 243(h) or asylum under section 208 of the Act. *Matter of Acosta,* Interim Decision 2986 (BIA 1985); 8 C.F.R. § 208.5, 242.17 (c). The respondent must establish the facts underlying her claim for such relief by a preponderance of credible, probative evidence. She must also establish that the facts proven satisfy the statutory standards of eligibility for these forms of relief. *Matter of Acosta, supra.*

To be eligible for withholding of deportation pursuant to section 243(h) of the Act, an alien's facts must show a clear probability of persecution in the country designated for deportation, on account of race, religion, nationality, membership in a particular social group, or political opinion. *INS* v. *Stevic,* ___U.S.___, 104 S. Ct. 2489 (1984). This means that the alien's facts must establish that it is more likely than not he would be subject to persecution for one of the grounds specified. *INS* v. *Stevic, supra,* at 2501. The respondent herein has not made such a showing.

To be eligible for asylum under section 208 of the Act, an alien must meet the definition of a "refugee," which requires

him to show persecution or a well-founded fear of persecution in a particular country on account of race, religion, nationality, membership in a particular social group, or political opinion. Section 101(a) (42) (A) of the Act, 8 U.S.C. § 1101(a) (42) (A); section 208 of the Act. This statutory standard variously has been described as meaning that an alien's facts must show a "good" or "valid reason to fear" or a "realistic likelihood of" persecution. *See Matter of Acosta, supra.* We have held that the well-founded fear standard asylum requires an alien's fear of persecution to have a sound basis in external, objective facts that show it is likely the alien will become the victim of persecution. We have further held that the eligibility standards for withholding of deportation and asylum are not meaningfully different and, in practical application, converge. *Id.*

Further, an alien may qualify for withholding of deportation under circumstances where an alien claims that he will be persecuted by individuals or an organization, rather than by a foreign government, provided the government concerned is either unable or unwilling to protect the alien. *Matter of McMullen,* 17 I&N Dec. 542 (BIA 1980); *see Rosa* v. *Ins,* 440 F.2d 100 (lst Cir. 1971); *Matter of Pierre,* 15 I&N Dec. 481 (BIA 1975); *Matter of Tan,* 12 I&N Dec. 564 (BIA 1967). However, withholding of deportation will be denied where the motivation behind the actions of the individuals or organization is personal rather than on account of race, religion, nationality, membership in a particular social group, or political opinion. *See Matter of Pierre, supra.*

Moreover, a showing that a persecutor's conduct furthers his goal in a political controversy is insufficient to establish persecution on account of "political opinion" within the meaning of the Act. Instead, the alien must show that is is his own, individual political opinion that a persecutor seeks to overcome by infliction of harm or suffering. *Matter of Acosta, supra.*

In the case before us, the respondent has not met the statutory standard of eligibility for asylum, regardless of whether her claim is assessed in terms of demonstrating a "clear probability," a "realistic likelihood," a "reasonable possibility," or a "good" or "valid reason to fear" persecution.

Even accepting as true that the incident at the house of the respondent's uncle did occur and that it was the result of the uncle's holding political views which his attackers opposed, the respondent has not shown that the attackers harmed her in order to overcome any political opinion of her own. The respondent has not established or even alleged that she has political opinions which would make her a target of persecution. As the attackers could not have expected that the respondent would be present at her uncle's house that day, or even have been aware of her existence until; they arrived there, it is unlikely that they planned in advance to include her among their victims. Thus, while the attackers may have been motivated by their own political goals such as, for example, the intimidation of other peasants involved in land reform, the record does not establish that the respondent was persecuted on account of any political opinion she herself possessed or was believed by the attackers to possess. In addition, the record does not establish that the attackers have any inclination to harm the respondent again for one of the grounds specified in the Act. Even if we accept as true the respondent's testimony that one of the men who participated in the incident subsequently harassed and threatened her on several occasions, the respondent has not shown that she has been singled out because of her race, her religion, her nationality, her membership in a particular social group, or her political opinion. It appears that the man approached the respondent solely for personal reasons, to deter her from exposing his participation in the incident. There is no indication that he maintained an interest in the respondent

because of her political opinion or any of the other grounds specified in the Act.

In addition, the respondent has shown no connection between her relationship to her brother who allegedly served in the military forces in El Salvador and left the country to escape the guerrillas, and the likelihood that she would be persecuted if she returned. Further, she has not established that the circumstances of the burning of the factory where she worked, or the incidents against passengers on public transportation, warrant a conclusion that she would be a target of persecution. Thus, while we sympathize with the respondent's reluctance to return to her native country where she has experienced fear and violence, we must conclude that she has not established her eligibility for asylum or withholding of deportation.

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: The respondent is permitted to depart from the United States voluntarily within 12 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of her failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

Chairman

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
United States Immigration Court

File No.: A 26 422 119 – Houston, Texas

In the Matter of
SOFIA CAMPOS-GUAJARDO, [sic]

RESPONDENT

January 30, 1985

IN DEPORTATION PROCEEDINGS

Charge: Section 241 (a) (2) of the Immigration and Nationalit [sic] Act. (8 U.S.C. 1251 (a) (2) - Entry without inspection.

APPLICATIONS: Political Asylum; 243(h); Voluntary Departure.

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is a 20-year-old, single, female, native and citizen of El Salvador. Pursuant to Order to Show Cause issued on September 11, 1984 (Exhibit 4), Respondent is alleged to have entered the United States without inspection near Brownsville, Texas on or about August 28, 1984 in violation of Section 241(a)(2) of the Immigration and Nationality Act.

Respondent admitted the four Allegations contained on the Order To Show Cause and conceded Deportability as charged. Respondent admitted that she is not a native or national of the United States, that she is a native of El Salvador and a citizen of El Salvador, and that she entered the United States near Brownsville, Texas on or about August 28, 1984 without inspection. Based upon Respondent's admissions Deportability was established by evidence that is clear, convincing and unequivocal and is not at issue in these proceedings.

Respondent declined to designate a country to which Deportation should be directed in the event such an order would issue from the Court. The Court directed that Respondent be Deported to her native country of El Salvador. With regard to the Court's designation, Respondent requested Witholding [sic] of Deportation pursuant to Section 243(h) of the Act. Respondent also requested additional relief from Deportation in the form of Political Asylum, and Voluntary Departure.

Proceedings were continued in order to provide Respondent with an opportunity to prepare and submit an Application for Political Asylum, Form I-589. The Application was received by the Court, and pursuant to regulation, the Application and relating materials were forwarded to the Department of State, Bureau of Human Rights and Humanitarian Affairs. Proceedings were then re-convened on January 23rd for a hearing on the merits of the Application for Political Asylum. The Application for Political Asylum may be found in the Record as Exhibit 2, Exhibit 3 is the opinion letter of the State Department dated December 12, 1984, and Exhibit 4 is additional evidentiary material consisting of newspaper clippings, affidavits, etc. with regard to general conditions in El Salvador.

Respondent was then placed under oath and proceeded to testify with regard to her Application for Political Asylum.

Respondent stated that she was a member of a working-class family in El Salvador consisting of at least seven children and her parents. She stated that her father became ill and was therefore unable to support the family. Other family members including Respondent had to then go to work; and in this regard, Respondnet [sic] began working in a fabric factory. The factory was located some distance from the family household and her commute to work involved a daily trip on public transportation.

Respondent stated that frequently the bus was stopped, either by agents of the Government or the guerrillas. When stopped by the military, generally the passengers were required to submit some identification documents. When stopped by the guerrilla, [sic] frequently the passengers were required to give the guerrillas money or other things of value, and even on occasion were physically abused. This type of abuse was especially prevalent with regard to female passengers on the bus. Respondent stated that on at least one occasion, the bus was stopped by indentified [sic] masked individuals who could have been representatives of either side, and one of the passengers was summarily dragged from the bus and killed. All of these things were witnessed by the Respondent.

Respondent testified that in February of 1984 she was required to go to her uncle's which was a substantial distance from her parent's residence. On this occasion she was raped and brutalized by individuals who at the time were unknwon [sic] to her. She, in addition, witnessed the murder of her uncle, a cousin, and the physical abuse of other family members. In the course of her attempted testimony with regard to this incident Respondent because [sic] extremely aggitated [sic] and was incapable of continuing with her

testimony. Court was adjourned in order to provide Respondent with an opportunity to recompose herself, and it was later determined that Respondent required medical attention to attempt to sedate her. Rather than force the Respondent to further testify with regard to this humiliating experience, it was suggested and agreed that the testimony regarding this matter be submitted in affidavit form. That affidavit with the recount of the incident may be found in the Record as Exhibit 5.

In the affidavit and in Respondent's subsequent testimony, Respondent stated that one of the participants in the incident was a member of her father's family. This relative eventually came to visit and live near her parents, and subsequently made numerous threats to Respondent that [sic] if she revealed his participation and culpability in the incident. He threatened to take serious reprisals against Respondent and her family, including her parents. Respondent stated that she was very much afraid of the threats that this individual had made against her, especially in light of the fact that she had witnessed his participation in the brutal murders and rape previously discussed.

After the February incident, Respondent required hospitalization and eventually left her parents' household to live in the home of her employers in the capital city of San Salvador. She continued to work at the factory for some six months, until August of 1984. Around that time the factory was on fire [sic] by the guerrillas, was closed, and Respondent accordingly without work [sic]. Respondent stated that she went back to her parents' home for a short period of time, but could not stay there in the vicinity of her "victimizers" and so left El Salvador soon there after [sic] to come to the United States.

Respondent stated that one of her brothers came to the United Staets [sic] prior to her coming to the United States,

and is still present in this country, living in New York. Her brother was a member of the military and after completing his service fled El Salvador out of concern for his safety.

In order to qualify for Asylum under the Refugee of [sic] Act of 1980, and [sic] Applicant must establish that he is a "refugee" with [sic] the meaning of Section 101(a)(42)(A) of the Act, 8 U.S.C. 1101(a)(42)(A). That section defines a refugee as:

> Any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return, and is unable or unwilling to avail himself or herself for the protection of, that country because of persecution or a well-founded fear of persecution of account of race, religion, nationality, membership in a partical [sic] social group, or political opinion.

In order to qualify for Witholding [sic] of Deportation the alien must show that her life or freedom would be threatened in the country of Deportation on account of her race, religion, nationality, membership in a particular social group, or political opinion. Section 243(h)(1) of the Act, 8 U.S.C. 1253(h)(1).

The Respondent bears the burden of proof in Asylum or 243(h) relief applications to establish by objective evidence either that she has a well-founded fear of persecution or that her life or freedom will be threatened on account of one of the five grounds of persecution enumerated above Section 101(a)(42) and in Section 243(h)(1). See *8 C.F.R. 208.5*; *ISN* [sic] v. *Stevic*, _____ U.S. _____, 52 U.S.L.W. 4724, 4727 (June 5, 1984); *Haitian Refugee Center* v. *Smith*, 676 F.2d 1023 (5th Cir. 1982); *Fleurinor* v. *INS*, 585 F.2d 129 (5th Circi. 1978) [sic]; *Matter of Exilus*, I.D. 2914 (BIA 1982). This language refers to more than an alien's state of mind.

She must demonstrate the likelihood that she would be persecuted on account of her race, religion, nationality, membership in a particular social group, or political opinion. Unstable conditions and political violence which affect a country's populous as a whole ordinarily are insufficient. There must be some special circumstances present before relief can be granted. See *Matter of Martinez-Romero*, I.D. 2872 (BIA 1981); *AFF-D*, 692 F.2d 595 (9th Cir. 1982); *Fleurinor* v. *INS*, supra; *Matter of Diaz*, 10 I&N Dec. 199 (BIA 1963). After carefully reviewing Respondent's Application, her testimony, and other matters of Record, this Court concludes that Respondent has failed to establish that she will be persecuted or that she has a well-founded fear of persecution within the contemplation of Section 208(a) and/or 243(h) of the Act. This finding is the same, regardless of whether the Asylum claim or Witholding [sic] of Deportation claim is assessed in terms of demonstrating a "clear probability," a "good reason," a "reasonable possibility," or a "realistic likelihood" of persecution. In either event she has not met her burden of proof under any standard as to qualify her for Political Asylum or Witholding [sic] of Deportation.

Respondent alleges that she has a fear of persecution because of political opinion and her membership in a particular social group. The political opinion alleged is that of a neutral caught up in the violence endemic to the country of El Salvador. However, though this Court is in agreement that Respondent may be considered to be a neutral in that conflict, there is no evidence presented that her neutrality has resulted in any persecution within the contemplation of the Act. Respondent's claim of her fear of persecution as the result of her membership in a poor Catholic working-class family is insufficiently specific for consideration of Political Asylum. Membership in this class would reasonably seem to include anywhere from 80 to 90 percent of the entire

population of the country of El Salvador. In either event, in view of the Court's finding that Respondent has not suffered persecution as contemplated by the Act, even assuming this Court considered such a class, no evidence has been presented to indicate that she has been persecuted resulting therefrom.

Respondent has indicated that she has never been arrested or detained by Government officials, other than ordinary identification which would seem to be reasonable in view of the civil unrest existing in El Salvador. Her principal fear is the result of the brutalization that occurred to her in February of 1984 and the subsequent threats of reprisals by the party who committed the acts against her person. It would appear to the Court that Respondent was an innocent victim in the violence that all too frequently disrupts life in El Salvador. Unfortunately, the incident that happened to Respondent in February of 1984 could have taken place as easily in the metropolitan areas in the United States as they did in that rural area in El Salvador. One can pick up the newspapers of any of the major cities in the United States and will find similar incidents recounted against people living in this country. Though sympathetic to the tragedy that had befallen the Respondent in El Salvador, unfortunately the fact that Respondent was so victimized does not create a basis by which this Court can grant the Respondent Political Asylum in the United States. Her fears of reprisals by the individual who committed those acts against either her or her family if she returns to El Salvador, cannot be considered persecution within the contemplation of the Act.

Based upon the foregoing, this Court concludes that Respondent has failed to sustain the burden of establishing that she would be singled out for persecution if returned to El Salvador and, accordingly, must deny her applications for Political Asylum and Witholding [sic] of Deportation.

Respondent has applied for permission to depart the United States voluntarily in lieu of an Order of Deportation pursuant to Section 244(e) of the Act. No evidence has been presented to the Court to indicate that Respondent is statutorily ineligible for this relief, although there may be some concern regarding Respondent's ability or the availability of funds to pay for her own transportation. However, Respondent has revealed herself to be an individual of good moral character and deserving of this minimal form of relief. She appears to fall within the guidelines set by the Board in *Matter of M-*, 4 I&N Dec. 626 (BIA 1952), and accordingly this Court, in its discretion, will grant Respondent's request to depart the United States voluntarily,

ORDER

ORDER: IT IS ORDERED that in lieu of an Order of Deportation the Respondent be Granted Voluntary Departure without expense to the Government on or before February 11, 1985 or any extension beyond such date as may be granted by the District Director and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if Respondent fails to depart when and as required, the privilege of Voluntary Departure shall be withdrawn without further notice or proceeding and the following Order shall thereupon become immediately effective: Respondent shall be Deported from the United States to El Salvador on the Charge contained in the Order to Show Cause.

IT IS FURTHER ORDERED that the Applications for Political Asylum or Witholding [sic] of Deportation pursuant to Section 243(h) be Denied.

January 30, 1985

/s/Robert Brown
ROBERT BROWN
Immigration Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 86-4087

SOFIA CAMPOS-GUARDADO, Petitioner,

IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

Petition for Review of an Order of the
Immigration and Naturalization Service

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 09-09-86, 5 Cir., 198__, ____ F.2d ____)

(March 9, 1987)

Before GEE and HILL, Circuit Judges, and HUNTER*, District Judge.

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* District Judge of the Western District of Louisiana, sitting by designation.

PER CURIAM:

☒ The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

☐ The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS GIBBS GEE
United States Circuit Judge

(2)

No. 86-1969

Supreme Court, U.S.
FILED
SEP 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

SOFIA CAMPOS-GUARDADO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the abuse that petitioner allegedly suffered in El Salvador at the hands of her cousin and others, and the future abuse that she purportedly fears she will suffer if she returns to that country, constitute "persecution or a well-founded fear of persecution on account of * * * membership in a particular social group, or political opinion," as required by 8 U.S.C. 1101(a)(42)(A) in order for petitioner to be eligible for asylum.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1969

SÓFIA CAMPOS-GUARDADO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 809 F.2d 285. The opinions of the Board of Immigration Appeals (BIA) (Pet. App. 13a-21a) and of the immigration judge (Pet. App. 22a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1987. A petition for rehearing and suggestion of rehearing en banc was denied on March 9, 1987 (Pet. App. 30a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a native and citizen of El Salvador who illegally entered the United States in August 1984. She conceded deportability and applied for asylum and withholding of deportation.

1. Petitioner based her applications on the following testimony, which the immigration judge accepted for purposes of his decision. In February 1984, petitioner traveled two hours from her home in El Salvador to visit her father's brother, the head of an agricultural cooperative formed several years earlier as the result of land reform. Her uncle was apprehensive because two men had demanded money he held for the co-op, and he had refused them.[1] Although frightened, petitioner remained to visit. Later, an older woman and two young men with rifles arrived and knocked down the door. They dragged petitioner, her uncle, and her cousins (a boy and three girls) outside, where they brutally tortured and then shot the uncle and his son. They then raped petitioner's 14-year-old cousin, followed by petitioner and her other cousins. The female accomplice shouted (unspecified) political slogans. The assailants threatened to kill the women unless they fled immediately. Petitioner suffered a nervous breakdown and was hospitalized in San Salvador. Pet. 3-4; Pet. App. 2a-3a, 14a-15a, 24a-25a.

Petitioner's further testimony was as follows. She remained in San Salvador to work in a factory (Pet. App. 3a).[2] On her first visit home, petitioner's mother introduced her to her father's cousins, who had fled from the

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[1] Petitioner introduced evidence that agricultural cooperatives throughout El Salvador routinely are forced to pay "protection" money to members of both sides of the conflict in El Salvador (Pet. 3; Administrative Record (A.R.) 42-43). Some military personnel extort money from their assigned cooperatives in exchange for not repressing them and as "some insurance against armed robbery by marauding individual bandits" (A.R. 42). Similarly, the guerrillas extort a "war tax" (money or food) in areas where they are active (*ibid.*). Cooperative managers list these "security" monies paid as "administrative costs" (*ibid.*). Petitioner did not know which category these men belonged to—military, guerrillas, or individual bandits (Pet. App. 15a).

[2] During that time, petitioner testified that her commute to work on public transportation had become increasingly dangerous since her

guerrillas and moved into the neighborhood. Petitioner recognized her cousin as one of her assailants. On subsequent visits home, petitioner's cousin-assailant would follow her, steal her money, and threaten to kill her and her family if she revealed his identity. Pet. App. 3a, 16a. She did not. After her workplace in San Salvador was burned down by guerrillas, petitioner returned to live at her parents' home near her cousin-assailant. Because she did not wish to remain there, however, she came to this country.

2. An immigration judge can grant withholding of deportation to a particular country only if he finds that the alien's "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion" (8 U.S.C. 1253(h)(1)). The judge can grant asylum only if he finds that the alien is a "refugee" (8 U.S.C. 1158(a)), *i.e.*, an alien unwilling to return to his or her country of nationality "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion" (8 U.S.C. 1101(a)(42)(A)). In this case, the immigration judge ruled that, even if the facts are exactly as petitioner alleges, the abuse that she has suffered and the abuse that she fears on return to El Salvador are not based on petitioner's "race, religion, nationality, membership in a particular social group, or political opinion" as required for either form of relief. Pet. App. 22a-29a.

The BIA affirmed (Pet. App. 13a-21a). It held that petitioner was ineligible for asylum or withholding because the harm she fears as a witness to, and victim of, criminal

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bus frequently was stopped by either the military seeking identification papers, the guerrillas seeking money, or unknown masked men who robbed and abused the passengers (Pet. App. 16a).

violence, *i.e.*, retribution by a perpetrator whom she can identify, is not persecution "on account of * * * membership in a particular social group, or political opinion" (*id.* at 19a). The BIA also observed that, even if the assailants were motivated to kill her uncle because of his political activity, there was no evidence that she was persecuted on account of any political opinion she, herself, possessed or was believed by her attackers to possess (*id.* at 20a). Rather, the evidence revealed that she held no political opinion, and that none was imputed to her during that unfortunate incident because her visit, and consequent assault, were coincidental.[3] Further, the BIA observed that, even if petitioner's cousin had threatened her with future harm, the motivation behind those threats was personal: to deter her from exposing his identity.

On petition for review, the court of appeals unanimously affirmed (Pet. App. 1a-12a). The court noted that the BIA had erred in its determination of the "burden of proof" that petitioner had to meet in order to be eligible for asylum,[4] but it observed that the BIA's denial of

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[3] In other words, according to the BIA, the violence petitioner experienced at her uncle's farm is no different in this respect from the fact that petitioner happened to work at a factory that was burned down and that she happened to be riding public buses during confrontations with soldiers, guerrillas, or thieves. See Pet. App. 20a. During episodes of violent civil strife, petitioner's risk of harm is shared by the entire populace.

The BIA also pointed out that attacks on El Salvadoran institutions such as co-ops, factories, and public transport may further some governmental goal (to control them), or subversive goal (to destroy them), in addition to any criminal goal to exploit them. The BIA observed, however, that any such generalized political aim clearly is insufficient to prove the required "singling out" of *this* petitioner and the critical "nexus," or causal link, between her injury and the five statutory bases for relief under the Act. See Pet. App. 19a-20a.

[4] The BIA had applied identical standards to determine petitioner's eligibility for asylum and her eligibility for withholding of deporta-

asylum "rested on different substantive grounds: Ms. Campos was found ineligible for asylum because she failed to show that the harm she fears—no matter how likely—is on account of 'political opinion' or 'membership in a social group' as those terms are used in the statute" (*id.* at 12a). The court agreed with the BIA that petitioner's testimony, taken as true, did not establish that required nexus (*id.* at 8a-10a). Petitioner's suggestion of rehearing en banc was denied without dissent (*id.* at 30a-31a).

ARGUMENT

1. Petitioner argues that the court of appeals "adopted the 'clear probability' standard of the BIA in determining whether the persecution petitioner has already suffered, and is likely to suffer in the future, rests on one of the five enumerated statutory bases" (Pet. 8-9). There is no basis for that argument. Nothing in the opinion of the court of appeals suggests that it applied any such standard, nor is it even meaningful to speak in terms of "clear probability" versus "well-founded fear" standards when considering whether an alien's testimony, taken as true, meets the nexus requirements of the Immigration and Nationality Act. All of the officials and judges who have reviewed petitioner's case have assumed that she met the requirement of showing persecution or a well-founded fear of persecution and have denied relief only because petitioner's own testimony shows that any such persecution is not based on any of the criteria specified in the Act.

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tion. In *Guevara Flores* v. *INS*, 786 F.2d 1242 (1986), cert. denied, No. 86-388 (Mar. 23, 1987), the Fifth Circuit had determined that the standard for eligibility for asylum was lower than the withholding-of-deportation standard. The court of appeals in this case based its rejection of the BIA's position on *Guevara Flores* (Pet. App. 11a). A month after the panel decision in this case, this Court decided *INS* v. *Cardoza-Fonseca*, No. 85-782 (Mar. 9, 1987), reaching essentially the same result as *Guevara Flores*.

Nothing in such a holding is at all inconsistent with anything in *INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), which involved only "[t]he narrow legal question whether the ['clear probability' and 'well-founded fear'] standards are the same" (slip op. 26).[5]

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[5] Petitioner's claim (Pet. 9 n.3) of "an arguable conflict" with *Artiga Turcios* v. *INS,* No. 86-7381 (9th Cir. Mar. 24, 1987), is likewise without foundation. That opinion (which has been withdrawn from publication pending disposition of the government's petition for rehearing, see 813 F.2d 262-266 (bound volume) (editor's note)) is about whether the alien's evidence did or did not show the requisite likelihood of persecution, not about the nexus requirements of the Act.

Although petitioner does not cite the case, we note that one week after *Artiga Turcios* a divided panel of the same court decided a different case involving facts somewhat similar to, but distinguishable from, this case. *Lazo-Majano* v. *INS,* 813 F.2d 1432 (9th Cir. 1987). Like petitioner, the alien in *Lazo-Majano* was an El Salvadoran woman who had been brutalized in her native country. Unlike petitioner, however, that alien was subjected to repeated brutalization by the same man, a member of the military whom she knew well. That man, Sergeant Zuniga, threatened to "expose" her as a subversive (which Zuniga knew she was not). The majority of the Ninth Circuit panel held that the persecution Olimpia Lazo-Majano had suffered at Zuniga's hands was suffered on account of her political opinion: "Zuniga is asserting the political opinion that a man has a right to dominate and he has persecuted Olimpia to force her to accept this opinion without rebellion" (813 F.2d at 1435). The majority found it quite important that Zuniga was a member of the military (despite his low rank): "Olimpia * * * believes that the Armed Force is responsible for lawlessness, rape, torture, and murder. Such views constitute a political opinion" (*ibid.*). And the majority placed considerable importance on Zuniga's threats—although the court recognized that they were cynical—to "expose" Lazo-Majano as a "subversive": "Even if she had no political opinion and was innocent of a single reflection on the government of her country, the cynical imputation of political opinion to her is what counts under both statutes" (*ibid.*). Judge Poole filed a strong dissent (*id.* at 1436-1441).

The reasoning of *Lazo-Majano* is at best questionable—the government's petition for rehearing with suggestion of rehearing en banc is

2. Petitioner also makes the fact-bound claim (Pet. 12-15) that her persecution and fear of persecution do indeed have a sufficient nexus to the statutory criteria to make her eligible for asylum. The court of appeals correctly rejected that argument.

Petitioner's story, which we assume for present purposes to be true, is one of vicious mistreatment by despicable attackers. But, indisputably, the Act does not make eligible for asylum every alien who has suffered mistreatment or has a well-founded fear thereof; rather, it must be shown that the persecution or feared persecution is based on one or more of the five statutory criteria. *Sanchez-Trujillo* v. *INS*, 801 F.2d 1571, 1576 n.7 (9th Cir. 1986) ("The Refugee Act did not comprehend 'refugee' status for everyone who fears adverse treatment by a foreign government, but only when the fear of persecution is on account of 'race, religion, nationality, membership in a particular social group, or political opinion.' "); *In re Mogharrabi*, Interim Dec. No. 3028 (BIA June 12, 1987), slip op. 9 ("It must * * * be remembered that an alien who succeeds in establishing a well-founded fear of persecution will not necessarily be granted asylum. He must also show that the feared persecution would be on account of race, religion, nationality, membership in a particular social group, or political opinion.").

Petitioner attempts in three ways to argue that her persecution or feared persecution was "on account of * * *

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pending—but, even if credited, it would not apply to this case. The motive of petitioner's cousin—a civilian—is, according to her testimony, to silence her about matters of historical fact. That motive differs from Sergeant Zuniga's supposedly "political" motive to quash opposition to his "opinion" that men have the right to dominate women. And there is no evidence in this case that anyone, even cynically, has ever attributed any political opinion to petitioner. Thus, the factors on which the *Lazo-Majano* panel purported to rely are absent in this case.

political opinion": she asserts that such persecution is "on account of the political opinion held by her uncle and attributed to her; on account of the political opinion motivating her persecutors; * * * or as a witness to a political execution" (Pet. 13 (footnotes omitted)). But the first of those assertions is unsupported by the record, and the second and third are based on misconstruction of the Act.

The BIA was willing to assume that petitioner's uncle was murdered because of his political opinion (Pet. App. 20a), but the record contains no support whatsoever for petitioner's bald assertion that that opinion was "attributed to her." The maltreatment that petitioner suffered was suffered by everyone, including children, who was unfortunate enough to be present at her uncle's farm when the attackers came; there is no evidence, direct or inferential, that the attackers cared whether their victims, other than petitioner's uncle himself, had any particular political views.[6] And the maltreatment that petitioner fears in the future from her cousin-attacker has nothing to do with anyone's political views: according to petitioner's own testimony, the threats she has received were made because she is a witness who could reveal her cousin's crime, not because of any real or imagined political disagreement.

Petitioner's assertion that she is eligible for asylum just because her attackers may have had a political motivation

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[6] Nor is there the slightest evidence that the attackers cared whether their victims were or were not members of the same family as petitioner's uncle; indeed, one of the attackers was himself a member of that family. It was presence at the farm, not family membership, that led to petitioner's persecution, and it is petitioner's ability to identify one of the attackers, not family membership, that leads to her present fear of persecution if she should return to El Salvador. Thus, petitioner's assertion that her persecution is "on account of membership in [a] particular social group or family" (Pet. 13 (footnote omitted)) is without merit.

is based on a misconstruction of the Act. The cases that she cites do not hold that the persecutor's political motivation by itself is sufficient to make the persecutor's victims or potential victims eligible for asylum.[7] To the contrary, those who suffer or fear persecution at the hands of one side of a political strife such as El Salvador's, but who fear such persecution for reasons other than their own real or perceived political opinions (or race, religion, nationality, or social-group membership), are consistently held to be ineligible for relief. See *Zepeda-Melendez* v. *INS*, 741 F.2d 285, 289-290 (9th Cir. 1984); see also *Sanchez-Trujillo* v. *INS*, 801 F.2d at 1581; *Florez-De Solis* v. *INS*, 796 F.2d 330, 335 (9th Cir. 1986); *Contreras-Aragon* v. *INS*, 789 F.2d 777 (9th Cir. 1986); *Zayas-Marini* v. *INS*, 785 F.2d 801 (9th Cir. 1986); *Lopez* v. *INS*, 775 F.2d 1015 (9th Cir. 1985); *Chavez* v. *INS*, 723 F.2d 1431, 1434 (9th Cir. 1984); *In re Mogharrabi*, slip op. 9; *In re Martinez-Romero*, 18 I. & N. Dec. 75 (BIA 1981), aff'd per curiam *sub nom. Martinez-Romero* v. *INS*, 692 F.2d 595 (9th Cir. 1982); *In re Pierre*, 15 I. & N. Dec. 461 (BIA 1975). It is a sad fact of

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[7] The statement petitioner quotes (Pet. 13 n.8) from *Coriolan* v. *INS*, 559 F.2d 993, 1001 (5th Cir. 1977)—a decision by the same court that decided petitioner's case—is dictum describing the factual truth that one may be persecuted without taking political action, not a statement that such persecution renders all such victims eligible for relief. The statement petitioner quotes from *Hernandez-Ortiz* v. *INS*, 777 F.2d 509 (9th Cir. 1985), is directly *contrary* to her assertion that the persecutor's political motivation is sufficient to create asylum eligibility in the victim without any real or perceived political opinion on the part of the victim. 777 F.2d at 516 (emphasis added) ("persecution occurs *only* when there is a *difference of views* between the persecutor's views or status and that of the victim"). The thrust of this entire section of the *Hernandez-Ortiz* opinion is that the political motivation of the persecutor is *relevant* and that its relationship with the real or perceived political opinion of the victim should be examined, not that the political motivation of the persecutor, by itself, can ever be *determinative*. See *id.* at 516-517.

life in many countries that those who have political ends sometimes wreak violence on wholly innocent, apolitical victims; but, as the courts have consistently recognized, that fact does not convert such persons into victims of "persecution on account of * * * political opinion."[8]

Petitioner's third attempt to establish a nexus is the assertion that any "witness to a political execution" necessarily suffers or fears persecution on account of political opinion. But there is no decision of any court—nor does petitioner even claim that there is any decision—supporting that construction of the statute. Rather, as the cases discussed above show, the bare minimum showing needed to make out a case of persecution on account of political opinion is that the alien at least had some political opinion attributed to him or her by the persecutor (see, *e.g.*, *Hernandez-Ortiz*, 777 F.2d at 516-517; *Zepeda-Melendez*, 741 F.2d at 289); there is no

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[8] As the Ninth Circuit put it, in order to prove eligibility for asylum or withholding of deportation based on a claim of political persecution, the applicant must show "persecution *resulting from* the petitioner's political beliefs." *Zepeda-Melendez*, 741 F.2d at 289 (emphasis added). In defining "refugee" status "on account of * * * political opinion" (8 U.S.C. 1101(a)(42)(A)), Congress noted that term's potential application to "political or religious dissidents," "prisoners of conscience," and "political prisoners" (H.R. Rep. 96-608, 96th Cong., 1st Sess. 9 (1979)). As the court of appeals correctly observed in this case (Pet. App. 9a), Congress declined to adopt in the Refugee Act of 1980 the Senate version of the "refugee" definition, which would have included persons "displaced by military or civil disturbance or uprooted because of arbitrary detention" and unable to return to their "usual place of abode" (see S. Rep. 96-256, 96th Cong., 1st Sess. 4 (1979); H.R. Conf. Rep. 96-781, 96th Cong., 2d Sess. 19 (1980)). Thus, Congress declined to accord refugee status to aliens facing the ordinary dangers and dislocations accompanying civil war. As the court of appeals stated in this case: "Congress did not intend to confer eligibility for asylum on all persons who suffer harm from civil disturbances—conditions that necessarily have political implications" (Pet. App. 9a).

necessary relationship between witnessing a political killing and holding, or being perceived to hold, any particular political view. In this case, petitioner's own testimony shows that her cousin has threatened her in order to intimidate her into silence about his criminal acts, not because of any political views that he thinks she holds.

In addition to these unavailing attempts to fit herself within the statutory criteria, petitioner argues (Pet. 13-15) that the total of her evidence somehow exceeded the sum of its parts, and that the court of appeals erred by not taking a cumulative approach of some sort.[9] But the incidents of random violence that petitioner described in her testimony—bus stoppings by the military and the guerrillas alike, and the burning of a factory by guerrillas (see Pet. App. 16a)—only reinforce the inference that petitioner's misfortune is unrelated to her real or imagined political opinions or social ties. Petitioner's evidence shows that her experiences at the co-op, at the factory, and on public buses indeed reflect isolated incidents—involving a variety of actors, victims, and possible motives—in which petitioner unfortunately was "at the wrong place at the wrong time" (*Sanchez-Trujillo,* 801 F.2d at 1581). Thus, although the cumulative approach for which petitioner contends does reinforce her (already strong) case that she has well-founded fears, it does nothing to aid her

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[9] In support of a cumulative approach, petitioner quotes (Pet. 14) paragraph 201 of Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva 1979). The quoted paragraph, however, stands for the unremarkable proposition that an alien's total experience may show that his or her fear of persecution is well founded even though no one incident alone would make out a well-founded fear of persecution. In this case it is undisputed (at least for present purposes) that petitioner's fear of persecution is well founded, and the question is whether the feared persecution is based on one of the criteria specified in the Act.

argument on the dispositive issue whether her fears relate to any criterion or criteria specified in the Act.

3. Despite the holding of the court of appeals that petitioner is statutorily ineligible for asylum or withholding of deportation, petitioner is for other reasons not now subject to deportation. Petitioner has been married since September 1985 to a citizen of the United States, and her application for an immigrant visa as an "immediate relative" (see 8 U.S.C. 1151(b)) is pending. The INS District Director in Miami, Florida (where petitioner and her husband now reside), has granted petitioner the privilege of extended voluntary departure (see 8 U.S.C. 1254(e)) until March 1988—by which time it is expected that petitioner's application for an immigrant visa will have been processed.

Although the consideration of petitioner's application is not yet formally complete, we are advised by the District Director that petitioner is prima facie eligible for the immigrant visa that she seeks and that she will receive such a visa in the absence of unforeseen circumstances.[10] Once she is admitted under an immigrant visa as a permanent resident, petitioner will become eligible in three years (see 8 U.S.C. 1430(a)) to become a citizen of the United States (again in the absence of unforeseen circumstances, such as petitioner's dissolving her marriage or committing a serious crime).

For this reason, as well as the lack of merit in petitioner's legal contentions, this is not a case that warrants review by this Court.

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[10] We shall advise the Court of the disposition of petitioner's application for an immigrant visa if the petition for a writ of certiorari is still pending at that time.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 86-1969

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

SOFIA CAMPOS-GUARDADO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 35.5, petitioner files this Supplemental Brief based on a recent decision by the Board of Immigration Appeals, which is relevant to the issues raised in the petition for certiorari.

ARGUMENT

I. THE NEED FOR REVIEW IN THIS CASE IS HIGHLIGHTED BY A RECENT DECISION OF THE BOARD OF IMMIGRATION APPEALS REEVALUATING THE STANDARD FOR ASYLUM ADJUDICATIONS IN LIGHT OF THIS COURT'S DECISION IN *INS v. CARDOZA-FONSECA*

In *INS v. Cardoza-Fonseca*, ____ U.S. ____ , 94 L.Ed.2d 434 (1987), this Court held that an asylum applicant need not establish clear probability of persecution in order to meet the well-founded fear standard established by Congress in the

Refugee Act.[1] The issue in this case is whether the court below erred in nonetheless requiring petitioner to show by a clear probability that the persecution she quite reasonably fears if returned to El Salvador is "on account" of her political opinions or social grouping.

Subsequent to the filing of the petition for certiorari, the Board of Immigration Appeals issued an opinion in *Matter of Mogharrabi*, Interim Decision No. 3028 (June 12, 1987),[2] clarifying the standard for asylum adjudications after *Cardoza-Fonseca*. Contrary to the approach followed in this case, the decision in *Mogharrabi* proceeds on the assumption that the well-founded fear standard applies to both prongs of the refugee definition. More specifically, there is no indication in *Mogharrabi* that an alien faces a higher burden in establishing the basis for persecution than in establishing the likelihood of persecution. To the contrary, the holding in *Mogharrabi* is framed in the following terms:

> After careful consideration of the entire record, we have concluded that a reasonable person in the respondent's circumstances would fear persecution if returned to Iran. We find the respondent's account of why he fears persecution based on his political opinions to be plausible, detailed, and coherent.

Appendix at 13a.

Petitioner's claim that the persecution she faces in El Salvador is based on political opinions imputed to her by the death squad that already raped her or, alternatively, on her family ties to a leader in the land reform movement, has never been judged according to the standard that the BIA is now appar-

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1 Under the Refugee Act, an alien is eligible for asylum, 8 U.S.C. § 1158, if he or she possesses a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1108(a)(42)(A).

2 A copy of the *Mogharrabi* decision is attached as an Appendix to this brief.

ently applying in asylum cases. Had the "reasonable person" standard been applied to petitioner's claim, her application for asylum would likely have prevailed.

On these grounds alone, certiorari should be granted. The decision below should then be vacated and remanded for further proceedings before the BIA consistent with its current view of the law.

II. THE PETITION FOR CERTIORARI CONTINUES TO PRESENT A LIVE CASE AND CONTROVERSY

In its response to the petition for certiorari, the government suggests that this case is inappropriate for review because Ms. Campos has married a United States citizen since filing her asylum application and has initiated the process of applying for an immigrant visa based on her marriage. While the facts as stated are true, they neither moot this case nor diminish the importance of the legal issues presented for this Court's review. To obtain an immigrant visa, Ms. Campos must be interviewed abroad by a consular official whose decision on whether to grant an immigrant visa is normally unreviewable. Obviously, should petitioner become a permanent resident during the pendency of this litigation—and thus no longer subject to deportation—petitioner will promptly notify the Court. At the moment, however, petitioner has not yet acquired a lawful status in this country, let alone any permanent status. Accordingly, her need for an asylum determination remains both real and immediate. She is entitled to that determination based on the appropriate legal standard. This petition for certiorari seeks to accomplish nothing more nor less.

Indeed, *Cardoza-Fonseca*, is dispositive on this point. As this Court noted in *Cardoza-Fonseca*, 94 L.Ed.2d at 444 n.3:

> The record indicates that respondent may well be eligible for eventual adjustment of status if she makes a timely application after the Attorney General establishes the procedures for administering [the Immigration and Re-

> form Control Act of 1986]. It would therefore appear that respondent might become a permanent resident by invoking the new procedures even if she is unsuccessful in her pending request for asylum. Nonetheless, the possibility of this relief does not render her request for asylum moot. First, . . . there is no way of knowing at this time whether respondent will be able to satisfy whatever burden is placed upon her to determine eligibility . . . . Second, respondent might be able to obtain permanent residence through the asylum procedure sooner than through the legalization program.

See also INS v. Chadha, 462 U.S. 919, 937 (1983) ("It is by no means certain . . . that Chadha's classification as an immediate relative would result in the adjustment of Chadha's status from nonimmigrant to permanent resident").

The same principle is equally applicable here.

CONCLUSION

This Court should grant certiorari for the reasons stated herein and in petitioner's earlier submission.

Respectfully submitted,

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APPENDIX

BOARD OF IMMIGRATION APPEALS

Date: June 12 1987 #3028

File: A23 267 920 - Baltimore
A26 850 376

In re: MAAJID *MOGHARRABI*
GHAMARTAJ MIRHAD-*TAFRESHI*

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Mark Raymond Quinn, Esquire
Bragar & Quinn
1200 18th Street, N.W., Suite 210
Washington, D.C. 20036

ON BEHALF OF SERVICE:
Arthur H. Gottlieb
General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251-(a)(2)]—Nonimmigrants - remained longer than permitted

APPLICATION: Asylum; withholding of deportation

BY: Milhollan, Chairman; Dunne, Morris, Vacca and Heilman, Board Members

In a decision dated August 16, 1985, an immigration judge found the respondents deportable as charged; and denied their application for asylum and withholding of deportation. Three months' voluntary departure was granted in lieu of deportation. The respondents appealed from the denial of asylum and withholding of deportation. Oral argument before the Board will be denied. The respondents' appeal will be sustained, and the application for asylum will be granted.

The respondents, husband and wife, are both natives and citizens of Iran. Both respondents were admitted to the United States as nonimmigrant students on or about September 8, 1978. The female respondent's status was subsequently changed to that of a spouse of a nonimmigrant student. The respondents were authorized to remain in this country until February 27, 1982, but they remained beyond that time. Orders to Show Cause were issued against them on August 28, 1984, charging them with deportability as overstays under section 241(a)(2) of the Immigration & Nationality Act, 8 U.S.C. § 1251(a)(2). At a joint deportation hearing begun on November 5, 1984, and concluded on July 2, 1985, the respondents conceded their deportability. The only issues at the hearing, and the only issues on appeal, concern the male respondent's application for asylum and withholding of deportation.[1]

An alien who is seeking withholding of deportation from any country must show that his "life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h)(1) of the Act, 8 U.S.C. § 1253(h)(1). In order to make this showing, the alien must establish a "clear probability" of persecution on account of one of the enumerated grounds. *INS* v. *Stevic*, 467 U.S. 407 (1984), at 413. This clear probability standard requires a showing that it is more likely than not that an alien would be subject to persecution. *Id.* at 429-30. Under the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 197, withholding of deportation is mandatory. Thus, once an alien has established that he qualifies for that relief, and that he is not ineligible under the provisions of section 243(h)(2), it must be granted, and he cannot then be returned to the country where he would face persecution. He can, however, be sent to another country under certain circum-

---

1 Only the male respondent submitted an application for asylum. The female respondent is included in her husband's application. *See* C.F.R. § 208.2. References hereafter to "the respondent" refer to the male respondent.

stances. In this important regard, withholding of deportation differs from asylum, which may be denied in the exercise of discretion to aliens who establish statutory eligibility for the relief.

In order to establish eligibility for a grant of asylum, an alien must demonstrate that he is a "refugee" within the meaning of section 101(a)(42)(A) of the Act, 8 U.S.C. § 1101(a)(42)(A). *See* section 208 of the Act, 8 U.S.C. § 1158. That definition includes the requirement that an alien demonstrate that he is unwilling or unable to return to his country because of persecution or a "well-founded fear" of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. The meaning of the term "well-founded fear" has been the subject of considerable controversy and litigation. The Board previously took the position that, as a practical matter, the showing required to establish a well-founded fear of persecution for asylum purposes was the same as that required to establish a clear probability of persecution for purposes of withholding of deportation. *Matter of Acosta*, Interim Decision 2986 (BIA 1985). However, the Supreme Court has recently rejected this approach. In *INS* v. *Cardoza-Fonseca*, ____ U.S. ____, 107 S. Ct. 1207 (1987), the Court held that the clear probability and well-founded fear standards do in fact differ, and that it was Congress' intent that they differ. The Court found it reasonable to assume that Congress intended to make it more difficult to establish absolute entitlement to withholding of deportation under section 243(h) than to establish mere eligibility for asylum under section 208. *Id.* at 1219. In so ruling, the Court rejected that part of our decision in *Matter of Acosta*, *supra*, wherein we held that the "clear probability" standard and the "well-founded fear" standard are not meaningfully different and, in practical application, converge. *Matter of Acosta* at 25. That portion of our decision in *Matter of Acosta* has therefore been effectively overruled.

In *INS* v. *Cardoza-Fonseca*, *supra*, the Court reiterated the *Stevic* rule that in order to establish a clear probability of persecution under section 243(h) of the Act, an alien must

prove that it is "more likely than not" that he will be persecuted. However, the Court held, such a probable showing of persecution need not be made in order to establish a well-founded fear of persecution under section 208. The Court specifically declined to attempt a detailed definition of "well-founded fear," or an explanation as to how that term should be applied. Noting that there is "obviously some ambiguity" in the term, the Court left a more concrete definition to the process of case by case adjudication. *Id.* at 1221.

It is clear that to a large degree the meaning of "well-founded fear" can in fact only be determined in the contexts of individual cases. Whatever words may be used in a definition, the approach must still be to assess each independently on its particular merits. Nevertheless, we think that some guidance can be provided, and would be helpful. We do not attempt a definitive statement on the meaning of well-founded fear, but rather are setting forth a starting point for use in an ongoing effort to formulate a workable and useful definition of the standard in question.

Although, as noted above, the Supreme Court in *INS* v. *Cardoza-Fonseca*, *supra*, did not attempt to define "well-founded fear," the Court in dictum in *INS* v. *Stevic*, *supra*, offered this guide for the meaning of well-founded fear: "as long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a *reasonable possibility*." *Id.* at 424-25 (emphasis added). In *Cardoza-Fonseca*, the Court noted the "obvious focus on the individual's subjective beliefs" in assessing whether a fear is well-founded. *Id.* at 1213. Perhaps more helpful, however, was the direction provided by the Court in *Cardoza-Fonseca* when it compared the well-founded fear standard with the clear probability standard of section 243(h). Not only are the two terms not identical, the Court noted, but since two different standards were used in the same Act, they must have been intended to have "significantly different" meanings. *Id.* at 1222, n. 31. The Court's view that the two terms are "signifi-

cantly different" thus serves as a starting point in defining the term well-founded fear.[2]

As suggested by Justice Blackmun in his concurring opinion in *INS* v. *Cardoza-Fonseca*, *supra*, some guidance regarding the meaning of well-founded fear can be found in decisions of the United States courts of appeals. Prior to the Supreme Court's decision in *Cardoza-Fonseca*, and after the Court's decision in *INS* v. *Stevic*, *supra*, a number of the lower courts addressed the issue of the well-founded fear standard, and attempted to define that term. The first court of appeals to address the question was the United States Court of Appeals for the Seventh Circuit, in *Carvajal-Munoz* v. *INS*, 743 F.2d 562 (7th Cir. 1984). The court there stated its view that the evidentiary burden of proof in asylum cases was not identical to that in withholding of deportation cases, although it found the two standards to be "very similar." *Id.* at 575. The Supreme Court, as just noted, has indicated that the terms are significantly different. Nevertheless, the Seventh Circuit's view of the showing necessary to establish a well-founded fear of persecution is worth considering. The court held that in order to establish the well-founded fear of persecution required for asylum,

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2 In addition to footnote 31, the Court also indicated in the body of its decision its approval of a "significantly different" standard for asylum as opposed to withholding of deportation. In discussing the old section 203(a)(7) of the Act, 8 U.S.C. § 1153(a)(7), repealed by the Refugee Act of 1980, the Court stated that it had been "repeatedly recognized" that the "fear of persecution" requirement for refugee admissions under section 203(a)(7) was "significantly different" from the requirement in section 243(h) that the alien show that he "would be" subject to persecution. *Id.* at 1214. The Court went on to conclude that when Congress replaced section 203(a)(7) and its "fear of persecution" with section 207, 8 U.S.C. § 1157, and its "well-founded fear of persecution," it "in no way wished to modify the standard that had been used under § 203(a)(7)." *Id.* 1215. Since the term well-founded fear is used in section 208 as well as in section 207, the Court further noted, the same lower standard of proof, "significantly different" from the section 243(h) standard, would apply to section 208, as well. *Id.* at 1215-16, n. 18.

> [t]he applicant must present specific facts establishing that he or she has actually been the victim of persecution or has some other good reason to fear that he or she will be *singled out* for persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

Id. at 574 (emphasis in original). The court also elaborated on the type of evidence necessary to make this showing:

> Ordinarily, this must be done through objective evidence supporting the applicant's contentions. Sometimes, however, the applicant's own testimony will be all that is available regarding past persecution or the reasonable possibility of persecution. In these situations, the applicant's uncorroborated testimony will be insufficient to meet the evidentiary burden unless it is credible, persuasive, and points to *specific* facts that give rise to an inference that the applicant has been or has a good reason to fear that he or she will be singled out for persecution on one of the specified grounds, or, alternatively or in addition thereto, must show through testimony and corroborative objective evidence that he or she has good reason to fear persecution on one of the specified grounds.

Id. at 574 (emphasis in original). Thus, the Seventh Circuit emphasized the need for the applicant to be specific in his claims, to show that there is a "reasonable possibility" of persecution, and to show that he has "good reason" for his fear of persecution.

The United States Court of Appeals for the Ninth Circuit, after first deciding in *Bolanos-Hernandez* v. *INS*, 767 F.2d 1277 (9th Cir. 1984), that the well-founded fear standard is a lesser one than the clear probability standard, turned to the meaning of well-founded fear in *Cardoza-Fonseca* v. *United States INS*, 767 F.2d 1448 (9th Cir. 1985). The court accepted the rationale of the Seventh Circuit that an applicant for asylum is required to "present 'specific facts' through objective

evidence to prove either past persecution or 'good reason' to fear future persecution." *Id.* at 1453, citing *Carvajal-Munoz* v. *INS*, *supra*, at 574. Like the Seventh Circuit, the Ninth Circuit also addressed the issue of corroborative evidence. Recognizing the difficulty of obtaining documentary evidence to support an asylum claim, the court held that if such evidence is not available, the applicant's testimony will suffice if it is credible, persuasive, and specific. The court rejected the Government's contention that such an approach to the well-founded fear standard rendered that standard wholly subjective, and emphasized that applicants

> must point to specific, objective facts that support an inference of past persecution or risk of future persecution. That the objective facts are established through the credible and persuasive testimony of the applicant does not make those facts less objective. However, "[m]ere assertions of possible fear" are still insufficient. *Shoaee* v. *INS*, 704 F.2d 1079, 1084 (9th Cir. 1983). It is only after objective evidence sufficient to suggest a risk of persecution has been introduced that the alien's subjective fears and desire to avoid the risk-laden situation in his or her native land become relevant.

Id. at 1453.

In *Diaz-Escobar* v. *INS*, 782 F.2d 1488 (9th Cir. 1986), the Ninth Circuit attempted to refine its requirement that there be both subjective and objective showings, saying, "[t]he subjective component requires a showing that the alien's fear is genuine. The objective component requires a showing, by credible, direct, and specific evidence in the record, of facts that would support a *reasonable fear* that the petitioner faces persecution." *Id.* at 1492 (emphasis added). The court concluded, "[w]hat is critical is that the alien prove his fear is subjectively genuine and objectively reasonable." *Id.* at 1492. The inquiry into the reasonableness of an applicant's fear was also alluded to by the Ninth Circuit in *Garcia-Ramos* v. *INS*, 775 F.2d 1370 (9th Cir. 1985), where the court stated that the well-founded fear standard "implicates a requirement of objec-

tive reasonableness. In other words, there must be some basis in reality or reasonable possibility that a petitioner would be persecuted." *Id.* at 1374.

The Sixth Circuit has similarly embraced the notion that the "more generous" well-founded fear standard of proof comprises both a subjective and an objective element. In *Yousif* v. *INS*, 794 F.2d 236 (6th Cir. 1986), the court held that while an applicant for asylum "may prevail upon establishing a subjective fear of persecution, the [applicant's] assertions of fear must nonetheless be supported by objective evidence." *Id.* at 243-4. *See also Youkhanna* v. *INS*, 749 F.2d 360 (6th Cir. 1984).

Like the Seventh, Ninth, and Sixth Circuits, the Fifth Circuit foretold the Supreme Court's decision in *INS* v. *Cardoza-Fonseca*, *supra*, and held that the well-founded fear standard requires a lesser degree of proof than the clear probability standard. *Guevara Flores* v. *INS*, 786 F.2d 1242 (5th Cir. 1986).[3] The Fifth Circuit also agreed with the other courts that the concept of a well-founded fear was at least partially a subjective one, insofar as fear is a subjective matter, and partially an objective one, because the fear is required to be well-founded. However, the Fifth Circuit offered a somewhat more concrete definition. The court held, "[a]n alien possesses a well-founded fear of persecution if a reasonable person in her circumstances would fear persecution if she were to be returned to her native country." *Id.* at 1249. This reasonable person standard was subsequently adopted by the Second Circuit, in *Carcamo-Flores* v. *INS*, 805 F.2d 60 (2d Cir. 1986).

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3 The Third Circuit is the only court which, prior to the Supreme Court's decision in *INS* v. *Cardoza-Fonseca*, *supra*, consistently held that the well-founded fear standard under section 208 is equivalent to the clear probability standard under section 243(h). The court first stated this view in *Rejaie* v. *INS*, 691 F.2d 139 (3d Cir. 1982), which was decided prior to the Supreme Court's decision in *INS* v. *Stevic*, *supra*. The Third Circuit specifically reaffirmed its position following *Stevic*. *Sotto* v. *United States INS*, 748 F.2d 832 (3d Cir. 1984). *See also Sankar* v. *INS*, 757 F.2d 532 (3d Cir. 1985). The Fourth Circuit declined to decide the issue. *Cruz-Lopez* v. *INS*, 802 F.2d 1518 (4th Cir. 1986).

We agree with and adopt the general approach set forth by the Fifth Circuit; that is, that an applicant for asylum has established a well-founded fear if he shows that a reasonable person in his circumstances would fear persecution. As noted by the Second Circuit, this "reasonable person standard appropriately captures the various formulations that have been advanced to explain the well-founded fear test." *Carcamo-Flores* v. *INS*, *supra*, at 68. It is a standard that provides a "common sense" framework for analyzing whether claims of persecution are well-founded. Moreover, a reasonable person may well fear persecution even where its likelihood is significantly less than clearly probable.

In determining whether the alien has met his burden of proof, we recognize, as have the courts, the difficulties faced by many aliens in obtaining documentary or other corroborative evidence to support their claims of persecution. Although every effort should be made to obtain such evidence, the lack of such evidence will not necessarily be fatal to the application. The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.[4] On the other hand, as pointed out in the Office of the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (Geneva, 1979) (hereinafter *Handbook*), the allowance for lack of corroborative evidence does not mean that "unsupported statements must necessarily be accepted as true if they are inconsistent with the general account put forward by the applicant." *Id.* at Part Two, B(1) § 197. Similarly, very generalized statements of fear will in most cases not suffice. In

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4 The requirement that an alien provide a "plausible and coherent account" of why he fears persecution is rooted in the International Refugee Organization, Manual for Eligibility Officers, at ch. IV, No. 175, Annex 1, pt. 1 § C19, p. 24 (May 1950). *See INS* v. *Cardoza-Fonseca*, *supra*, at 1216, n. 20.

general, the assessment of the application for asylum should be a qualitative, not a quantitative one.

Where the country at issue in an asylum case has a history of persecuting people in circumstances similar to the asylum applicant's, careful consideration should be given to that fact in assessing the applicant's claims. A well-founded fear, in other words, can be based on what has happened to others who are similarly situated. The situation of each person, however, must be assessed on its own merits. *See Handbook*, *supra*, at Part One, Chap. II, B(2) § 43.

We note that although our decision in *Matter of Acosta* has been effectively overruled by *INS* v. *Cardoza-Fonseca*, *supra*, insofar as *Acosta* held that the well-founded fear standard and the clear probability standard may be equated, much of our decision remains intact, and good law. Indeed, we still find in *Acosta* some guidance regarding the meaning of a well-founded fear. In *Acosta*, we set forth four elements which an applicant for asylum must show in order to establish a well-founded fear of persecution. What we required was that the evidence establish that

> (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could easily become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien.

Id. at 22.

In our view, these requirements, for the most part, survive the Supreme Court's decision in *Cardoza-Fonseca*, and are still useful guidelines in assessing an asylum application. However, we have determined that one small but significant change in these requirements should be made in view of the Court's ruling. The second requirement should be changed by omitting the word "easily." Thus, it is enough for the applicant to show that the persecutor could become aware that the applicant possesses the belief or characteristic in question. The omission

of the word easily lightens the applicant's burden of proof and moves the requirements as a whole into line with *Cardoza-Fonseca*. Of course, all these requirements must now be considered in light of the lower burden of proof which will be imposed on asylum applicants generally.

It must also be remembered that an alien who succeeds in establishing a well-founded fear of persecution will not necessarily be granted asylum. He must also show that the feared persecution would be on account of his race, religion, nationality, membership in a particular social group, or political opinion. Thus, for example, aliens fearing retribution over purely personal matters, or aliens fleeing general conditions of violence and upheaval in their countries, would not qualify for asylum. Such persons may have well-founded fears, but such fears would not be on account of their race, religion, nationality, membership in a particular social group, or political opinion. *See e.g. Sanchez-Trujillo* v. *INS*, 801 F.2d 1571 (9th Cir. 1986); *Contreras-Aragon* v. *INS*, 789 F.2d 777 (9th Cir. 1986); *Diaz-Escobar* v. *INS*, *supra*; *Lopez* v. *INS*, 775 F.2d 1015 (9th Cir. 1985); *Zepeda-Melende* v. *INS*, 741 F.2d 285 (9th Cir. 1984); *Martinez-Romero* v. *INS*, 692 F.2d 595 (9th Cir. 1982); *Matter of Pierre*, 15 I&N Dec. 461 (BIA 1975). Finally, an applicant for asylum must also show that he merits the relief as a matter of discretion.

While under *Matter of Acosta*, *supra*, we were able to consider an application for asylum and withholding of deportation as, for most purposes, one, this approach requires some modification after *INS* v. *Cardoza-Fonseca*, *supra*. Given that the core of evidence and testimony presented in support of the asylum and withholding applications will in almost every case be virtually the same, such evidence and testimony may still be presented in a single hearing. However, in actually adjudicating the applications, a clear delineation of the findings should be made as to each application. We anticipate that as a general rule the asylum application, with its lower burden of proof, will be adjudicated first. If the applicant is found eligible for asylum, and worthy of the relief as a matter of discretion,

there may be no need to determine as well whether a clear probability of persecution exists.

We now turn to the application of these new standards to the case presently before us. The respondent fears persecution in Iran primarily because of an altercation he had with an official or agent of the regime of the Ayatollah Khomeini. The respondent testified and attested to the following facts regarding that incident. In February of 1981, while in the United States, the respondent went with an Iranian friend to the Iranian Interests Section at the Algerian Embassy. His purpose was to document his continuing student status, in order to enable him to continue receiving funds from relatives in Iran. To this end, he took with him photocopies of his passport and his Arrival-Departure Record (Form I-94). When he presented the photocopies to a student who was working at the Embassy, he was told that the originals were required. According to the respondent, he was informed that the originals were necessary because students who did not have them had probably submitted them to the Immigration and Naturalization Service in connection with asylum applications. The student-employee was insistent, and the respondent's friend asked to see the supervisor. The supervisor appeared, but further trouble ensued. The student apparently grabbed the respondent's friend's neck, but the supervisor separated them. The student then told the respondent's friend that he and "his kind had better keep their eyes and ears open because 'their day' would come soon." Respondent's affidavit at 2. In response, the respondent told him that "he and his kind had robbed Iran of all that was worth living for and that they were nothing more than religious fascists stuffing their pockets with the nation's wealth." Affidavit at 3. According to the respondent, the student then drew a gun, and he and his friend ran out the door. The respondent testified that there were cameras all around the room recording these events. A witness for the respondent testified at the hearing that he accompanied the respondent and his friend to the Algerian Embassy, although he waited in the car and did not go inside with them. This witness testified that when the respondent and his friend returned to the car, they were

nervous, and a couple of people were following them (Tr. at 35-36). It is the respondent's contention that he is now known to Khomeini officials and that as a result he has good reason to fear persecution if returned to Iran. The respondent also testified that he had participated in anti-Khomeini demonstrations in the United States.

After careful consideration of the entire record, we have concluded that a reasonable person in the respondent's circumstances would fear persecution if returned to Iran. We find the respondent's account of why he fears persecution based on his political opinions to be plausible, detailed, and coherent. The respondent's account of the incident at the Embassy appears to us to be credible, and there is nothing in the record to otherwise suggest that the respondent lacks credibility. The respondent clearly expressed his political views at the Iranian Interests Section and his opinions were extremely derogatory to the regime in power. The Service does not dispute that opponents of the Ayatollah Khomeini are often persecuted for their opposition. In this case, a reasonable person in the respondent's position would fear that his opposition to that regime has become known to those who are both in a position, and who have the inclination, to punish him for it. Under these circumstances, we find that the respondent has met his burden of showing a well-founded fear of persecution in Iran. Given the statements made to agents of the Khomeini regime by the respondent while in the Algerian Embassy, any persecution which might occur would be on account of political opinion.

There are no adverse factors of record in this case. We find no basis for considering a discretionary denial of relief. The application for asylum will accordingly be granted. We therefore find it unnecessary to decide whether the respondent has also established a clear probability of persecution for section 243(h) purposes. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The application for asylum is granted.

Chairman